No. 528

Supreme Court of the United States

OCTOBER TERM, 1942

O. L. HASTINGS, ET AL., *Petitioners*,

vs.

SELBY OIL & GAS COMPANY, ET AL.,
Respondents

ARGUMENT FOR RESPONDENTS ON RE-ARGUMENT OF THE CAUSE

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AUTHORITIES

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The discussion will consider only the questions on which the Court has requested argument. A statement of the nature of the case and the pertinent facts will facilitate the discussion.

Respondents brought this suit against Petitioners in the United States District Court for the Western District of Texas, Austin Division, challenging the validity of an order of the Railroad Commission, and asking that such order be cancelled and the drilling

and operation of any well under it be enjoined. (R., 4-11). The claims for relief were: **first,** that the result of the challenged order will be to deprive Respondents of their property without due process of law, and **second,** that the order was arbitrary and unreasonable and not supported by evidence. (R., 4-11). Jurisdiction of the trial court rested on two bases: **first,** that the suit involved rights claimed under the Constitution of the United States, in that Respondents contended that the effect of the challenged order will be to deprive them of their property without due process of law; and **second,** that because of the diversity of citizenship between Petitioners and Respondents, the trial court had jurisdiction of Respondents' suit, vouched to them by Section 8 of Article 6049c, Vernon's Civil Statutes of Texas, 1925,[1] attacking the order as arbitrary and unreasonable and not supported by evidence.

The Commission assigned as the reason for granting the permit that it "should be granted to prevent confiscation of property"[2]. (R., 107). The examiner who held the hearing on the application for permit had reported to the Commission that "the testimony

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[1] Copied in Appendix, *post*, 27.

[2] "Rule 37. Nos. 2 and 3, Jim Dickson, 3.85 acres Mary Cogswell Survey, Rusk County, Texas. Applicant: Hastings & Dodson, c/o John A. Storey, Vernon, Texas.

"The application of Hastings & Dodson for an exception under the provisions of Rule 37 coming on to be heard on the 26th day of April, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception and that same should be granted to prevent confiscation of property;

"Now, Therefore, it is Ordered that the application of Hastings & Dodson for an exception under the provisions

was that on the spacing arrangement there is no immediate loss of oil to applicants' (Hastings and Dodson) lease." (Exhibit 6, R., 59, 70.)

The challenged order granted a permit to drill a second well on a 3.85-acre tract (Ex. 2; R. 59, 63, 64) in the proven area of the East Texas field. Respondents owned an oil and gas lease on a tract of land adjoining the 3.85-acre tract. (Ex. 1; R., 59, 62, 63.) The well on the 3.85-acre tract and each well on each adjoining tract was, at the time the Commission acted, under field-wide orders of the Commission, allowed to daily produce 20 barrels of oil. (R., 67, 98-99); the 3.85-acre tract was drilled to greater density than the average of the surrounding tracts (R., 81-82); and to a greater density than the average of the East Texas field (R., 98). The 3.85-acre tract had, at the time of the hearing on the application, produced more oil per acre than the average of surrounding leases (R. 85); the number of barrels of oil allowed to be produced per acre per day from the 3.85-acre tract exceeded the average per acre per day production allowed to the surrounding leases (R., 86.) The existing well on the 3.85-acre tract was sufficient to produce the tract's fair share of the recoverable oil, and on a basis of 20 barrels per day allowable would recover an amount of oil substantially equivalent to the amount of recover-

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of Rule 37 and a permit to drill well No. 2, Jim Dickson lease containing 3.85 acres of land out of the Mary Cogswell Survey in Rusk County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill well No. 2, to be spaced as follows:

No. 2—150 feet east of the west lines;
130 feet southwest of well No. 1.

"It is Further Ordered that well No. 3 is hereby denied."

able oil originally in place under the lease, and in place under the lease at the time of the hearing on the application and at the time the order was made granting the permit. (R., 87.) The drilling and production of a second well on the 3.85-acre tract would result in that tract having a production and drainage advantage over each and every adjoining tract. (R., 88.) At the time the hearing was held on the application, and at the time the permit was granted, the 3.85-acre tract was not suffering drainage of oil to other leases that would ultimately result in its owners being prevented from recovering an amount of oil substantially equivalent to the amount of recoverable oil in place under the lease. (R., 88.) The drilling of a second well on the 3.85-acre lease and the production of oil from that well would result in more oil being recovered from that tract than the amount of recoverable oil in place under the tract (R., 88), and in the drainage of large quantities of oil (estimated at approximately 80,000 barrels) from Respondents' lease (R., 77, 94-95.) Respondents, like Petitioners Hastings and Dodson, without a second well on the 3.58-acre tract, had sufficient wells to produce the recoverable oil under their tract. (R., 87.) The drilling of an offset well on Respondents' tract to the well involved in this suit would not prevent, but only reduce, the drainage caused by a second well on the 3.85-acre tract (R., 92), and would cost Respondents some ten or twelve thousand dollars (R., 93.) If density of drilling on the 3.85-acre tract is compared with the density of drilling on a surrounding area of eight times the size of the 3.85-acre tract it appears that the 3.85-acre tract would be at a 37½% density disadvantage. (R., 92.) Such

an area, however, did not take into account all of the 149.8 acres included in the surrounding leases. (R., 74-75.)

At the conclusion of Respondents' testimony Petitioners moved for judgment. (R., 101.) The motion was sustained (R., 102, 103), and judgment was entered in behalf of Petitioners (R., 49-50.) The ruling was based on a belief that the decision of this Court in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 310 U. S. 573, denied the trial court jurisdiction of such a case as was made by the pleadings and evidence in this case.

This case being an appeal from an order sustaining a motion for judgment on Respondents' testimony, the testimony must on this appeal be accepted as true. *(Moreman et al vs. Armour & Co. et al*, 65 S. W. (2d) 334; *Bugh et al vs. Employers' Reinsurance Corp.* (Fifth Cir.), 63 Fed. (2d) 36. Further "only that portion of the evidence which tends to prove the case of the demuree can be considered and evidence which tends to break down the case of demuree can not be considered." (64 C. J. 380.) When the testimony is so considered two results are evident: (1) that the evidence is sufficient to support a conclusion that the effect of the order will be to take Respondents' property without due process of law, and (2) that the evidence is sufficient to support the conclusion that the order was arbitrary and unreasonable and not supported by evidence. There was evidence that the result of the order will be to enable Petitioners Hastings and Dodson to drain Respondents' land, and there was no evidence that without the proposed well Petitioners Hastings and Dodson will not be able to recover their oil. The trial court did not make any determination of the

facts. *(Selby Oil & Gas Co. et al vs. Railroad Commission of Texas et al*, 128 Fed. (2d) 334.)

The jurisdictional question upon which the court has requested additional argument is confined to "does the jurisdiction of federal district courts over **controversies between citizens of different states*** include jurisdiction to review the orders, involved in this case, of the Texas Railroad Commission?" It is, therefore, assumed that the Court is satisfied that under the pleadings and evidence the trial court had jurisdiction of this suit in so far as jurisdiction is grounded on a claimed right under the Fourteenth Amendment to the Constitution of the United States, and the discussion will be limited to the question, "does the jurisdiction of federal courts over **controversies between citizens of different states** include jurisdiction to review the orders, involved in this case, of the Railroad Commission?"

The court proceedings provided by Texas law for judicial examination of the orders of the Railroad Commission are "cases" or "controversies" within the meaning of Article III, Section 2, Clause 1, of the Constitution of the United States.

Rule 37 provides that:

> "No well for oil or gas shall hereafter be drilled nearer than 300 feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line, lease line, or subdivision line; provided that the Commission in order to prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than

*Emphasis throughout the argument is supplied.

> above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property" * * *.

In *Gulf Land Co. vs. Atlantic Refining Co.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80, the court said:

> * * * "the term 'confiscation' evidently has reference to depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind."

The order involved in this case granted a permit to drill a well in exception to Rule 37. The Commission grounded its order on the basis that the drilling of the well was necessary "to prevent confiscation of property." The Railroad Commission is bound by its rule and can grant a permit to prevent the confiscation of property only if the well is, in fact, necessary to prevent such confiscation. *(Railroad Commission vs. Gulf Production Co.*, 134 Tex. 122, 125-126, 132 S. W. (2d) 254, 255; *Gulf Land Co. vs. Atlantic Refining Co.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80.)

The Texas statute (Section 8 of Article 6049c) provides that:

> "Any interested person affected by * * * any rule, regulation or order made or promulgated by the Commission * * *, and who may be dissatisfied therewith, shall have the right to file a suit in a court of competent jurisdiction in Travis Coun-

> ty, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said * * * rules, regulations or orders. * * * In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

In *Railroad Commission vs. Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030, a suit brought under the above statute, the court said:

> * * * "In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same."

The quoted language clearly means that Section 8, Article 6049c, gives to a person dissatisfied with such an order of the Railroad Commission as is involved in this case, a right or cause of action to litigate the validity of the order and have the court determine whether or not there existed at the time the order was entered suffcient facts to justify the order. If it appears upon the trial of a suit brought under the statute that there did not exist sufficient facts to justify the order, the legal result is that the order was arbitrarily made and entered. The statute contemples an adversary action. As in this case,

the Respondents contend that the proposed well is not necessary "to prevent confiscation of property," and that the drilling of the well and production of oil from it will result in taking Respondents' property; while the Petitioners contend that the order of the Commission is justified to prevent confiscation of their property; so, in any case brought under the statute challenging a permit to drill a well in exception to Rule 37, there will be an adverse interest between the parties in respect to property rights.

The court proceeding contemplated by the statute is entirely judicial in its nature. It contemplates a hearing of testimony, the findings of facts, the entry of a judgment, and the issuance of process to enforce the judgment. It is not a proceeding in which the court will or may determine the wisdom of the Commission action, but one in which the court will determine only the power and authority of the Commission under the facts to take the action in question. The proceeding in the court is not legislative in character like that involved in *Prentis vs. Atlantic Coast Line Company*, 211 U. S. 210.

The controversy present in such a case is definite and concrete, touching the legal relations of the parties having adverse legal interests. (*Aetna Life Insurance Co. vs. Haworth*, 300 U. S. 227, 240-241). A concrete case is presented involving real and substantial controversy and admitting of immediate and definite determination of the legal rights of the parties. The judicial function includes the issuance of process to enforce obedience to the judgment entered.

In this case when the application for the order was

before the Commission, the Commission had for determination the question of whether or not the proposed well was necessary to prevent confiscation of the Petitioners' property. On the trial before the court, the court had for determination the questions (1) whether or not evidence which existed at the time the order was entered was sufficient to justify the granting of the permit; that is, whether or not the facts existing at the time the order was entered were sufficient to show that without the proposed well Petitioners' property would be confiscated,—this under Section 8 of Article 6049c; and (2) whether or not the drilling and operation of the proposed well would result in depriving Respondents of their property without due process of law,—this under the Due Process Clause and also under Section 8 of Article 6049c. The Commission in the first instance did not have for determination a question of legislative nature or governmental policy, but it was called upon to exercise a *quasi* judicial power; and the trial court was called upon to exercise only judicial power. The order of the Commission was to be made on the basis of past and existing facts, and not for prospective application, as in the case of a rate order.

This case does not involve the determination of state governmental policies committed by statute to the state administrative process; but, on the contrary, involves property rights of the parties.

Included in the Railroad Commission regulatory powers is the power to promulgate well spacing rules for the purpose of preventing waste of oil and gas. Rule 37 provides for exceptions to the general spac-

ing rule where such exceptions are necessary to prevent confiscation of property or to prevent waste. If provisions were not made for exceptions to prevent waste, then the cardinal purpose of the rule would be defeated in cases where exceptions are necessary to prevent waste. If provisions were not made for exceptions to prevent confiscation of property, then the rule might under some circumstances and in some applications be invalid. Unless the rule lays down a standard to guide the Commission in granting exceptions, the rule is invalid. It does purport to provide such a standard, namely, the prevention of confiscation of property and the prevention of waste.

In *Railroad Commission, et al vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1026, the court said:

> * * * "There must be some factual basis for classifying some applicants as subject to the general spacing provisions of the rule and other applicants as within the exception. This reasonable basis can only be a showing of unusual conditions peculiar to the area where the well is sought to be drilled—not testimony that would be equally applicable to any other part of the field. Therefore, in order to sustain the validity of the rule we must give it the construction that the exception is to be granted only upon a showing of unusual conditions.
>
> * * * "If it is intended to grant permits to some and refuse them to others under like circumstances, the rule gives the Commission the power of arbitrary discrimination, and is void."

This case does not involve the determination of a state governmental policy committed to the Railroad Commission of Texas. It was in the exercise of the governmental policy that the state committed to the Railroad Commission the power to promulgate rules for the prevention of waste of oil and gas. In the exericise of this power the Commission promulgated Rule 37 and provided for exceptions to the general spacing rule. The matter of granting a permit under the provision for exceptions *to prevent confiscation of property*, as in this case, is not a matter of governmental policy, but one of determining the property rights of the applicant in relation to the correlative rights of owners of adjacent lands. If the applicant is suffering confiscation of his property, he has a legal right to a permit to drill a well in exception to Rule 37. If his property is not being confiscated and the proposed well will result in draining oil from adjoining leases, he does not have any right to a permit to drill; and the Commission is without power to grant him such a permit. Where the permit has been granted in the absence of existing facts justifying the Commission action, suit by an adjacent land owner who will be adversely affected by the drilling and production of the well does not involve a matter of governmental policy, but property rights of the parties.

Article 6049c, Vernon's Texas Civil Statutes, does not confine the review thereby contemplated to a state court in Travis County.

In 1891, the Legislature of Texas enacted a statute establishing the Railroad Commission of Texas.

(Acts of the Regular Session of the Twenty-second Legislature, page 55; 10 Gammel's Laws of Texas, 57). Section 6[1] of this statute provided that any railroad company or other party at interest who was dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, might file suit "in a court of competent jurisdiction in Travis County, Texas," attacking the same. The substance of this section of the statute appears as Article 6453, Vernon's Texas Civil Statutes.

In *Reagan vs. Farmers Loan & Trust Co.*, 154 U. S. 362, 391, the court said:

> "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts. *Cowles v. Mercer County*, 7 Wall. 118; *Lincoln County v. Luning*, 133 U. S. 529: *Chicot County v. Sherwood*, 148 U. S. 529.
>
> "We need not, however, rest on the gen-

[1]Copied in Appendix, *post*, p. 28.

> eral powers of a Federal court in this respect, for in the act before us express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit. Section 6 provides that any dissatisfied 'railroad company, or other party at interest, may file a petition' 'in a court of competent jurisdiction in Travis County, Texas, against said commission as defendant.' The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis County, but in Travis County. The language differing from that which ordinarily would be used to describe a court of the State was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is 'a court of competent jurisdiction in Travis County.' Not only is Travis County within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held Act of June 3, 1884, c 64, 23 Stat. 35. It comes, therefore, within the very terms of the act."

This holding of the Supreme Court of the United States in the *Reagan* case has stood without question from May 26, 1894.

Section 8 of Article 6049c was originally enacted in 1932. It is presumed that the Legislature had knowledge of the construction which had previously been given to the Act of 1891 by the Supreme Court of the United States in the *Reagan* case with respect

to the right of a dissatisfied party to file his suit in the United States District Court for the Western District of Texas. The Legislature in using in Section 8 of Article 6049c substantially the same language as that used in the Act of 1891 is presumed to have intended that the language in the later Act be given the same construction as that given the language in the earlier Act. As a matter of statutory construction, it will be presumed that the Legislature in enacting Section 8 of Article 6049c intended that it be given the same construction as was given the former Act. (*Arrowood vs. Blount*, 121 Tex. 52, 41 S. W. (2d) 412, 414; *Stephens County vs. Hefner*, 118 Tex. 397, 16 S. W. (2d) 804.)

It has heretofore been considered settled that a dissatisfied person might bring suit in the United States District Court for the Western District of Texas on the cause of action vouched to him by Section 8 of Article 6049c, where diversity of citizenship existed between the parties. See *McMillan vs. Railroad Commission*, 51 Fed. (2d) 400; *Gulf Land Co. vs. Atlantic Refining Co.*, 113 Fed. (2d) 902; and *Stanolind Oil & Gas Co. vs. Ambrose*, 118 Fed. (2d) 847.

Furthermore, Article 6049c cannot be construed to confine the review thereby contemplated to a state court in Travis County, and the Article upheld as valid. Obviously it gives to the dissatisfied party a right to attack the validity of Railroad Commission orders on something short of constitutional grounds. See *Railroad Commission vs. H. & T. C. R. R. Co.*, 90 Tex. 340, 38 S. W. 750, 755, 756, involving the Act of 1891, previously referred to.

If the laws of the State of Texas recognize such a right or cause of action in the dissatisfied or injured party and accord to the citizens of this State the right to litigate in the state courts, the property right being personal to the litigants and not public in character, the Legislature of Texas could not, where the amount in controversy is within the jurisdiction of a Federal District Court, deny to a person the right to bring his suit in a Federal District Court where diversity of citizenship exists between the parties.

In *Railroad Commission of Louisiana vs. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 420, a provision of the Constitution of Louisiana provided that a person dissatisfied with a Commission order might file a petition in a court of competent jurisdiction "at the domicile of the Commission, against the Commission as Defendant," and that either party thereto might appeal to the Supreme Court of the State. In the case cited, the Court said:

> * * * "The single question before us is as to the character of the rates provided in Order No. 552, whether such rates, are confiscation, or, if there is any difference, whether the rates are only unreasonable, unjust and inadequate, although not confiscatory, and, therefore, not in violation of the Federal Constitution. The question under Articles 284 and 285 of the Constitution of Louisiana, *supra*, even of the unreasonableness of the rates, may be inquired into by a Federal court, by reason of the diverse citizenship of the parties to this

> suit, and the complainant is not confined to a state court upon this question."

In the *Reagan* case, *supra*, at page 391, the Court said:

> * * * "For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another State having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts."

Any other rule would transgress the provisions of Article III, Section 2, Clause 1, of the Constitution of the United States, providing that the judicial power of the Federal Government shall extend to controversies between citizens of different States. And a State Legislature may not validly deny to a citizen of another State, where diversity of citizenship exists between the parties, the right to litigate his property rights in the Federal courts, assuming that the jurisdictional amount is present.

Undoubtedly Section 8 of Article 6049c gives to an interested party or one disadvantageously affected by an order of the Railroad Commission the right

to bring suit challenging such order. The effect of the statute is to give to such a person a cause of action or right to bring a suit attacking the validity of the order and, where successful, to secure equitable relief against enforcement of the order or action under it.

While the Texas Legislature cannot by its enactments enlarge or limit the jurisdiction of Federal courts by providing that certain classes of suits may or may not be brought in a Federal court, it can create causes of action in behalf of persons and corporations of which Federal courts may assume jurisdiction where the necessary jurisdictional amount is present and the parties are residents and citizens of different states.

Whether or not the right or cause of action given by Section 8 of Article 6049c may be prosecuted only in a state court is a question which can be decided finally only by this court. If the Texas courts were to hold that suits on the right or cause of action given by Section 8 of Article 6049c can be brought in the state courts, but only in those courts, this court would undoubtedly hold that where diversity of citizenship exists and the necessary jurisdictional amount is present, the suits can be brought in the Federal courts, nothwithstanding the ruling of the Texas courts. Such a construction of the statute by the courts of Texas would uphold the legislative declaration of the public policy of the state that the right and cause of action given by the statute exist in persons disadvantageously affected by Commission orders and may be litigated in the Texas courts. If this court were to strike the statute down because the Texas courts in construing it had limited

its terms to contemplate suits between private individuals only in the state courts, then such a ruling by this court would defeat the public policy of the state as declared by the Legislature, with the result that the statute would be destroyed and this court would, in effect, say that since under the statute, so construed, suits contemplated by it cannot be brought in the Federal courts, they may not be brought in any court. And, so, as in the first instance, the Texas courts would attempt to control the jurisdiction of the Federal courts, so in the second instance the Federal courts would deny to citizens of Texas the right to litigate in the state courts rights and causes of action given by the Texas law; and thereby this court would attempt to control the jurisdiction of the state courts. In order to preserve the public policy of the state, as declared by the statute, and uphold the statute, this court would, of necessity, have to hold that, notwithstanding the construction placed upon the statute by the Texas courts, suits on the right or cause of action given by the statute may be maintained in the Federal courts where there is diversity of citizenship between the parties and the requisite jurisdictional amount is present. (*Frost vs. Corporation Commission*; 278 U. S. 515, 526-528; *Truax vs. Corrigan*, 257 U. S. 312, 341-342.) Any other holding by this court would defeat the public policy of the state in granting the right or cause of action. The general rule that construction of a state statute by the court of last resort of the state is binding on this court would not prevent such a holding by this court.

The fact that the statute provides that the Commission shall be made a party to such a suit would

present no obstacle to such a holding by this court if the statute were so constructed by the Texas courts, because in such a suit the charge must be that the members of the Commission acted illegally or in excess of their legal authority and in such a circumstance official character of the members of the Commission would be disregarded and in the litigation they would be looked upon as having acted as individuals. (*Ex parte Young*, 209 U. S. 123.)

The Texas courts could not construe the statute to confine jurisdiction of such suits to the state courts and uphold the statute as giving the right to bring such suits only in the state courts and thereby defeat jurisdiction of the Federal courts; and if the Texas courts so construed the statute, this court to avoid denying to the Texas Legislature the right to give its citizens a cause of action to be litigated in the state courts and to uphold constitutional jurisdiction of the Federal courts, would have to hold that under the statute, where diversity of citizenship exists and the jurisdictional amount is present, that suits contemplated by the statute may be brought in a Federal court.

The holding in *Alpha Petroleum Company vs. Terrell et al*, 122 Tex. 257, 59 S. W. (2d) 364, 367-369, does not weigh against the contentions here made, because in that case the court was only considering the question of whether or not, under Section 8 of Article 6049c, suit might be brought in the district court of Montgomery County, Texas or only in a district court of Travis County, Texas. The court was only considering which of the several state district courts of Texas had jurisdiction of a suit instituted to assert the right or cause of action granted by the statute.

The Texas Workmen's Compensation Act, Article 8307, Section 5, Vernon's Texas Civil Statutes, in its pertinent parts, provides:

> ***"Any interested party who is not willing and does not consent to abide by the final ruling and decision of said Board (Industrial Accident Board) shall, with in twenty (20) days after the rendition of said final ruling and decision by said board, file with said Board notice that he will not abide by said final ruling and decision, and he shall, within twenty (20) days after giving such notice, bring suit in the county where the injury occurred to set aside said final ruling and decision, and said Board shall proceed no further toward the adjustment of such claim, other than hereinafter provided."

The Texas courts have held that the requirement of this statute that suit shall be brought "in the county where the injury occurred" is jurisdictional in character. *(Oilmen's Reciprocal Ass'n. vs. Franklin*, 116 Tex. 59, 286 S. W. 195; *Mingus vs. Wadley*, 115 Tex. 551, 285 S. W. 1084.) It has been held that the statute does not exclude the jurisdiction of the Federal district court of the district including the county where the injury occurred, provided there is diversity of citizenship between the parties and the jurisdictional amount is shown. *(Ellis vs. Assn. Industries Ins. Corp.*, 24 Fed. (2d) 809, 810, writ of certiorari denied, 278 U. S. 649.)

In *Ry. Co. vs. Whitton's Adm.*, 13 Wall. 270, there was involved a Wisconsin statute providing for the

recovery of damages whenever the death of a person was caused by a negligent act or default of another. The statute further provided "that such action shall be brought for a death caused in this state, and **in some court established by the constitution and laws of the same.**" In that case the Court held that the provision requiring the action to be brought in a court of the state did not prevent removal to a federal court and maintenance in that court of a suit brought under the statute.

The question is analogous to that which is raised by statutes which required that upon a foreign corporation obtaining a permit to do business in a state, the corporation must agree not to remove to a Federal court any suit brought against it. *(Harrison vs. St. Louis & S. F. R. R. Co.*, 232 U. S. 318, 328; *Holmes Ins. Co. vs. Morse*, 20 Wall. 445, 453.) The state may not by general law grant a right to persons and forbid its enforcement in the Federal courts where there is diversity of citizenship and the jurisdictional amount is shown.

There are not present in this case grounds similar to those found in Railroad Commission vs. Pullman Co., 312 U. S. 496, which make it appropriate for the District Court to withhold the exercise of its equity jurisdiction.

The *Pullman Company* case involved the construction of a local statute which had not been construed by the courts of last resort of the State. It also involved a claimed right under the Constitution of the United States. Depending upon the construction of a State statute by the courts of last resort of the State, the issues in the case might be disposed of

without determining the question arising under the Constitution of the United States. To avoid making "a tentative answer which may be displaced tomorrow by a State adjudication," this Court remanded the *Pullman Company* case with directions to the trial court to retain the case on the docket, pending the parties securing a construction of the statute by the State courts. A similar situation existed in the case of *City of Chicago, et al., vs. Fieldcrest Dairies, Inc.*, 316 U. S. 168. No such situation exists in this case. The Supreme Court of Texas in *Railroad Commission of Texas vs. Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1035, has determined the scope of judicial review contemplated by Section 8 of Article 6049c.

The only other possible question of statutory construction that could be involved in this case is whether or not Article 6049c confines the review thereby contemplated to a State court. Obviously the Supreme Court of Texas cannot construe that statute, as it is involved in this case, where there is a diversity of citizenship, to limit the review to a State court. If the Supreme Court of Texas did construe the statute as having such a purpose, this court nevertheless would say, and necessarily so under Article III of the Constitution of the United States, that so long as the State statute gives to citizens of the State the cause of action provided by Article 6049c, it cannot deny to a citizen, where there is diversity of citizenship between the parties and the required jurisdictional amount is present, the right to litigate his claims in a Federal court.

There are not present in this case grounds similar to those upon which the Court in Railroad Commission vs. Rowan & Nichols Oil Company, 311 U. S. 614, 615, held it was proper for the Federal District Court to decline jurisdiction of the cause.

In the *Rowan & Nichols* case the question arising under the local law was whether or not the challenged plan of proration distributed "the allowable production among the various producers on a reasonable basis." This Court concluded that the Texas decisions did not make clear whether the local courts would exercise an independent judgment on what is "reasonable," and that under the Texas cases, as understood by this Court, the standard of "reasonable basis" under the statute opened the same range of inquiry as the oil company, in effect, asserted to exist in its claims under the Due Process Clause. The Court had found these claims to be untenable and held that, "what ought not to be done by the Federal courts when the Due Process Clause is invoked, ought not to be attempted by these Courts under the guise of enforcing a State statute." In this appeal the ultimate question involved is whether or not Respondent was entitled to a hearing and determination of the facts by the trial Court. So far as the state statute is concerned, the question to be determined here is whether or not there existed sufficient evidence to support the challenged order. The range of inquiry under this statute is not the same as the range of inquiry opened up by the claim under the Fourteenth Amendment. There the range of inquiry is confiscation *vel non*.

The Supreme Court of Texas has heretofore held in *Gulf Land Co. vs. Atlantic Refining Co.*, 134. Tex.

59, 70-71, 131 S. W. (2d) 73, 80, that the term "confiscation," as used in Rule 37, means "depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind." In *Railroad Commission of Texas et al vs. Shell Oil Company, Inc., et al*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030, the Supreme Court of Texas has held that in a suit under Article 6049c, the trial is for the purpose of determining whether or not at the time the order was entered there then existed sufficient facts to justify the same. So far as the question arising in this case under local law is concerned, the issue and scope of inquiry have been definitely settled by the Supreme Court of Texas. The issue is whether or not there existed at the time the challenged order was entered sufficient facts to support the conclusion that the challenged order was necessary to prevent Petitioners Hastings and Dodson being denied a fair chance to recover the oil and gas in and under their land, or their equivalent in kind.

The only recent decision of the Supreme Court of Texas which could possibly be urged as raising a question as to whether or not "grounds similar to those existing in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 311 U. S. 614, 615," exist in this case "which make it appropriate for the District Court to decline jurisdiction of the cause," is *Railroad Commission of Texas vs. Wencker*, decided February 10, 1943, 168 S. W. (2d) 625, advance sheet of March 23, 1943. In the companion cases, No. 495, *G. E. Burford et al, Petitioners, vs. Sun Oil Co. et al.*, and No. 496, *Sun Oil Co. et al, Petitioners,*

vs. G. E. Burford et al, Respondents, a memorandum was filed after oral argument, citing the *Wencker* case and urging that the decision in the *Wencker* case demonstrates that the Texas law on the scope of judicial review of Rule 37 orders is so uncertain that the Federal courts should not assume the burden of passing on the validity of such orders. The controlling question in the *Wencker* case was whether or not the Commission had passed on Wencker's application as a request for a second well. The Court concluded that the Commission had not passed on the application as a request for a second well and that, since the Commission's jurisdiction was primary, the case was moot. The case does not bear upon the question of scope of review.

WHEREFORE, it is respectfully submitted that the judgment and order of the Circuit Court of Appeals should be affirmed.

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Copies of this Argument have been furnished to Messrs. Gerald C. Mann, Attorney General of Texas, E. R. Simmons and Jas. D. Smullen, Assistants Attorney General of Texas, Austin, Texas, and Messrs. W. Edw. Lee, Tyler, Texas, and John Porter, Longview, Texas, attorneys for Petitioners.

APPENDIX

Section 8, Article 6049c, Vernon's Texas Civil Statutes, 1925, provides as follows:

> "Sec. 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, sec. 8; Acts 1935, 44th Leg., p. 180, ch. 76, sec. 14.)" Vernon's Ann. Civ. St., Art. 6049c, Sec. 8.

Section 6, Chapter 51, pp. 58, 59, Acts of the Twenty-second Legislature, Regular Session (10 Gammel's Laws of Texas, pp. 60, 61), provides as follows:

> "Sec. 6. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act, or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: Provided, that if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days notice."